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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 318, 323 and 409

JOHN A. BURNS, Governor of the State of Hawaii,
Appellant,

v.

WILLIAM S. RICHARDSON, *et al., Appellees.*

ELMER F. CRAVALHO, *et al., Appellants,*

v.

WILLIAM S. RICHARDSON, *et al., Appellees.*

KAZUHISA ABE, *et al., Appellants,*

v.

WILLIAM S. RICHARDSON, *et al., Appellees.*

On Appeal From the United States District Court for the District of Hawaii

Brief for William S. Richardson, Lieutenant Governor of the State of Hawaii, Appellee

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OPINIONS BELOW

The opinion of the District Court dated February 17, 1965, and entered April 9, 1965, is reported at 238 F. Supp. 468, and appears at R. 62-81. Its opinion dated April 28, 1965, is reported at 240 F. Supp. 724 and appears at R. 151-65. In addition, a short unre-

ported opinion of the District Court, dated March 9, 1965, granting a motion to alter or amend the judgment of February 17, 1965, appears at R. 88-91; and an informal memorandum opinion, dated March 31, 1965, is attached as Appendix B, pp. 28a-29a, of the Brief of Appellant John A. Burns.

JURISDICTION

The basis of jurisdiction in the District Court was the Civil Rights Act, 42 U.S.C. §§ 1983, 1988, and 28 U.S.C. § 1343. Pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge District Court was convened.

The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b). The first of the orders of the District Court from which the appeal is taken was dated February 17, 1965, but was not entered until April 9, 1965 (R. 195); the second was dated and entered on April 28, 1965. (R. 197) The essential portions of the first order had been stayed and reopened by the District Court in response to a timely motion, (R. 88-91) and were not reinstated until April 28, 1965. (R. 164) The notice of appeal in No. 318 was filed on May 3, 1965 (R. 165), and the notices of appeal in Nos. 323 and 409 were filed on May 7, 1965 (R. 180, 184).

STATEMENT OF THE CASE

In summary, the three-judge District Court did the following things about which some or all of the appellants in these consolidated cases complain.

1. Held that registered voters as a base for apportioning the Hawaii legislature was constitutionally permissive. (R. 67-75; 238 F. Supp. at 472-476)

2. Held that the scheme of having representative districts from which different numbers of representatives are elected was constitutionally permissive. (R. 79-80; 238 F. Supp. at 478-479.)

3. Held that the boundaries of the representative districts followed historical, political, geographic and physical lines and that the method of districting was not part of any invidious scheme to disenfranchise any person or group or to dilute the vote of any person. (R. 75, 77; 238 F. Supp. at 476, 477.)

4. Held that the Constitution of the State of Hawaii required any reapportionment of the legislature to be only by constitutional amendment and that the legislature had no power to do so even on an interim or temporary basis. (R. 78; 238 F. Supp. at 478).

5. Adhered to the 1966 general election deadline prescribed by this Court and ordered the legislature to take the necessary action to provide for a constitutional convention, as the only means available under the Constitution of the State of Hawaii to accomplish reapportionment within the prescribed deadline. (R. 78; 238 F. Supp. at 478.)

6. Enjoined the legislature from taking final action on any legislation, except as necessary to organize and provide funds for the legislative session, until all necessary steps to convene a constitutional convention had been provided for by legislative act. (R. 80, 164; 238 F. Supp. at 478-479.)

7. Held that the legislature's proposed plan for reapportioning the senate was unacceptable for adoption by the Court as an interim plan to be used for the election of senators in 1966 and until the State's constitution could be properly amended. (R. 164; 240 F. Supp., 732.)

SUMMARY OF ARGUMENT

The three-judge District Court committed no error and its decision must be affirmed.

1. The United States Constitution protects against having an individual's *vote* for state legislators impaired when the weight of his vote is in a substantial fashion diluted when compared with the weight of votes of citizens living in other parts of the state. There is no constitutional right to vote, nor is there any constitutional right to be represented. There is only constitutional protection of a person's vote. Thus the starting point of any apportionment plan must be the number of *voters* within the several parts of a state. The number of people within these parts, as a base for apportioning members of a state legislative body, is therefore permissible *only* when these numbers of persons will produce an apportionment substantially equivalent to that which the numbers of *voters* would produce.

2. Nothing in the United States Constitution requires single-member legislative districts in either or both houses. To have or not to have multi-member districts is a matter of civic taste to be determined in each state in accordance with the state's own constitutional provisions.

Hawaii's choice of multi-member districts for its house of representatives is not subject to federal constitutional attack.

3. The boundaries of the representative districts in Hawaii were rationally drawn, do not result in the dilution of any person's vote, and do not operate to disenfranchise any person. They meet every constitutional test.

4. A state legislature has power to reapportion itself *only* if that power is granted to it by the constitution of the state. There is no inherent power to do so, no such power can be implied from the broad grant of *legislative* power, and no court, state or federal, has any authority to grant such power if the people of the state have not. The Court below was without error in denying such power, even on a temporary basis, to the Hawaii legislature, the people of Hawaii having reserved such power to themselves.

5. The Court below did not commit error in requiring the legislature to provide the machinery for a constitutional convention to correct the malapportionment of the senate as this was the only constitutional means by which the people of Hawaii could act within the 1966 general election deadline apparently set by this Court. The Court below properly retained jurisdiction of the case so that a reconstituted senate could be elected in 1966 under an apportionment plan ordered by the Court in the event the people of Hawaii were unable to devise a valid plan in time.

6. The lower Court had power to restrain the legislature from taking action on other matters until the Court's order was obeyed. In so far as the 1965 general session of the Hawaii legislature is concerned, this point is moot. In so far as later sessions are concerned, this Court should affirm the existence of such power in the lower Court as the only real way to compel compliance with its order.

7. The lower Court did not abuse its discretion in refusing to order the legislature's apportionment scheme (H.B. 987, R. 113) into effect—*as the Court's plan*—for the 1966 general election. The Court had unquestioned power to fashion its own apportionment

plan for the 1966 general election. It wisely declined, first giving the people of Hawaii the opportunity to do so by constitutional convention and next, deferring to the legislature to propose an interim plan for the Court to adopt. The fact that the Court did not find the legislature's plan acceptable to the Court for adoption as the Court's plan, was not an abuse of discretion.

ARGUMENT

1. REGISTERED VOTERS AS A BASIS FOR APPORTIONMENT IS CONSTITUTIONALLY PERMISSIVE. Nowhere in any decision of this Court is it suggested that a state may not constitutionally limit the right of suffrage so long as such limitation is not based upon race, color, previous condition of servitude or sex. (U.S. Const., Articles XV, XIX.)

Nowhere in the series of 1964 reapportionment cases decided by this Court (*Baker* v. *Carr,* 369 U.S. 186; *Reynolds* v. *Sims,* 377 U.S. 533; *WMCA* v. *Lomenzo,* 377 U.S. 633; *Lucas* v. *The 44th General Assembly of the State of Colorado,* 377 U.S. 713; *The Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 595; *Davis* v. *Mann,* 377 U.S. 678; *Roman* v. *Sincock,* 377 U.S. 695) is it even remotely suggested that a state does not have the right, within the constitutional proscription of the 15th and 19th Amendments, to say that children, aliens, felons or transients within a state may not vote in state elections.

In none of these decisions does this refer to the debasement or dilution of anything but a citizen's *vote.*

Indeed, in *Reynolds* v. *Sims,* this Court begins its decision on the merits with the following statement:

> Undeniably the Constitution of the United States protects the right of all *qualified citizens* to vote,

in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the *right of suffrage* has made this indelibly clear. It has been repeatedly recognized that all *qualified voters* have a constitutionally protected *right to vote,* Ex parte Yarbrough, 110 U.S. 651, and *to have their votes counted,* United States v. Mosely, 238 U.S. 383. In Mosely the Court stated that it is "as equally unquestionable that the *right to have one's vote counted* is as open to protection . . . as the right to put a ballot in a box." 238 U.S., at 386. The *right to vote* can neither be denied outright, Guinn v. United States, 238 U.S. 347, Lane v. Wilson, 307 U.S. 268, nor can it be destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 315, nor diluted by ballot-box stuffing, Ex parte Siebold, 100 U.S. 371, United States v. Saylor, 322 U.S. 385. As the Court stated in Classic, "Obviously included within the right to choose, secured by the Constitution, is *the right of qualified voters* within a State to cast their ballots and have them counted. . . ." 313 U.S., at 315. Racially based gerrymandering, Gomillion v. Lightfoot, 364 U.S., 339, and the conducting of white primaries, Nixon v. Herndon, 273 U.S. 536, Nixon v. Condon, 286 U.S. 73, Smith v. Allwright, 321 U.S. 649, Terry v. Adams, 345 U.S. 461, both of which result in *denying to some citizens their right to vote,* have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the *right of suffrage* in this country. The *right to vote* freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the *right of suffrage* can be denied by a debasement or dilution of the *weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise. (377 U.S. at 554-555; Emphasis added.)

In *Wesberry* v. *Sanders*, 376 U.S. 1, this Court concluded that the constitutional prescription for election of members to the House of Representatives of the Congress of the United States "by the People", construed in its historical context, "means that as nearly as is practicable one man's *vote* in a congressional election is to be worth as much as another's".

This Court also stated that:

> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some *voters* a greater voice in choosing a Congressman than others. (376 U.S., at 14) (Emphasis added.)

Further, this Court stated that the Constitution's plain objective was that of making equal representation for equal numbers of people the fundamental goal, concluding:

> No right is more precious in a free country than that of having a voice in the election of those who make laws under which, as good citizens, we must live. Other rights, even the most basic are illusory if the *right to vote* is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. (376 U.S., at 17-18) (Emphasis added.)

Wesberry, said this Court in *Reynolds* v. *Sims*:

> . . . clearly established the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our

> problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from *the basic standard of equality among voters* in the apportionment of seats in state legislatures. (377 U.S. at 560, 561) (Emphasis added.)

In *Reynolds* v. *Sims,* this Court swung back and forth in its use of the terms "population" and "voters", giving no apparent preference to either term:

> We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of *residents,* or *citizens,* or *voters.* Mathematical exactness or precision is hardly a workable constitutional requirement. (377 U.S. at 577) (Emphasis added.)

However, it is an inescapable conclusion from the decisions of this Court that it is the *voter* and only the *voter* who has rights that the constitution protects.

It is true, of course, that the word "population" is used frequently in the Court's decisions. It is a word often used to describe a particular population, as, for example, "school population", "inmate population", "hospital population" and "military" or "citizen" population.

It does no violence to any constitutional provision to restrict its meaning in reapportionment matters to "voter population". Indeed, it is the position of the Appellee that such a meaning is the *only* one that can constitutionally be required.

The appellant in No. 318 urges in his brief that what is required by the constitution is an apportionment based upon total population, or *gross* population

and that registered voters as a base is constitutionally permissive *only* when the number of voters happens to be an adequate reflection of total population—

> A "registered voters" measure cannot be upheld in itself; and its products may be upheld only if it happens to be an adequate reflection of total population—and only as long as it is. (Brief, No. 318, p. 43.)

> It [the registered voters measure] could only be sustained on the basis of its correspondence, in result in a particular instance, with a permissible population—based measure. (Brief, No. 138, p. 69.)

We submit that the appellant in No. 318 has missed the mark by a full 180 degrees.

We submit that just the opposite is true: that total population as a basis for apportionment is constitutionally permissive *only* when the use of total population results in an apportionment substantially equivalent to that which the use of registered voters would produce.

Sincock v. *Duffy*, 215 F. Supp. 169 (Delaware), the three-judge District Court reviewed an apportionment plan for Delaware. The basis for apportionment was registered voters. The Court correctly identified the question as one of "debasement of voting rights" (at 172) and stated:

> We take judicial notice of the fact that in the State of Delaware, as in the other States of the United States, there is a direct and stable relationship between the number of inhabitants in a given area and the number of electors therein and that the ratio of electors to inhabitants is relatively stable. We find, therefore, that the number of inhabitants of a given area in the State of Delaware

> reflects with relative accuracy the number of electors in that area, and for the purposes of adjudicating the issues in this case that it is the fact that the number of inhabitants is a relatively accurate indicator of the number of *electors entitled* to be represented in the General Assembly from the area given if representation is to be measured on a population-area basis. (215 F. Supp. at 175-176.)

The arguments advanced by the appellant in No. 318 in support of a population base clearly and undeniably show that a population base *in Hawaii* cannot be used because *in Hawaii* the number of inhabitants is *not* "a relatively accurate indicator of the number of electors entitled to be represented" in the legislature.

As the appellant so carefully demonstrates (see particularly Brief, No. 318, pp. 52-56) substantially different results would be achieved by using total population than by using registered voters. Total population cannot, therefore, be constitutionally valid and the lower Court was without error in requiring, *in Hawaii,* registered voters as the base for new apportionment plans.

In *Buckley* v. *Hoff,* 243 F. Supp. 873 (Vermont) the Court noted:

> It is often argued that the Supreme Court must ultimately condemn the registered voter base in general because of its potential abuse in areas of the country where people are systematically deprived of the right to vote. This argument overlooks the possibility that different rules may apply in different parts of the nation. As the Supreme Court remarked in Reynolds v. Sims, supra, 377 U.S. at 578, 84 S. Ct. at 1390: 'What is marginally permissible in one State may be unsatisfactory in another, depending on the circumstances of the

> case.' In Vermont there is no evidence that anyone has been unjustly denied the franchise in elections to the General Assembly. On the contrary, we note that the 209,225 registered voters constitute 53.7% of the 389,895 residents of the State. Surely this fact demonstrates that registered voters can properly be used as a representative base for legislative apportionment in Vermont. (243 F. Supp. at 876).

Evidence before the lower Court clearly demonstrates that *in Hawaii* every effort is made to encourage voter registration. See particularly the testimony of Eileen K. Lota, (R. 276-286.) and Defendants' Exhibits B and C, (R. 402-406.).

As shown by Plaintiffs' Exhibit 14, Table 5 (R. 364) 56.1% of the total population are registered voters; 87.1% of the total number of persons eligible to vote. (Compare Vermont, where 53.7% of the total population was registered. 243 F. Supp. at 876.)

In Hawaii, there is also an exceptionally high voter participation in elections. In the 1964 general election, 214,694 of the 239,361 registered voters participated, a percentage of 89.7%. (See Intervenors-Plaintiffs' Exhibit GO-4, R. 409, 410 at 410.)

What more rational adherence to the "basic standard of equality among voters" can there be than to apportion seats in Hawaii's legislature *on the basis of voters*!

At the time of the last reapportionment of the House, in 1959, there was a total of 175,317 voters registered in all representative districts for the general election in 1958. With a house of 51 members, the theoretical number of voters that each member should represent

was 3,437, (175,317 ÷ 51). This fact would indicate a range of from 1719 voters to 5155 voters for each representative district because a district having one more than half of the theoretical number of registered voters would be entitled to one representative and a district would not be entitled to a second representative until the registered voter population of the district exceeded the theoretical number by one more than the theoretical number plus one half of such number.

Each one of the eighteen representative districts falls well within that range.

The representative elected from the first representative district, the district having the least registered voters in 1958, represented 2,209 registered voters, 490 more than the minimum theoretically required for one representative.

The six representatives elected from the fifteenth representative district, the district having the most registered voters in 1958, (21,063) each represented 3,510 registered voters, 73 more than the theoretical number each representative should represent.

The three representatives elected from the second representative district, the district having the highest ratio of registered voters to representatives, each represented 4,609 registered voters, 546 less than the maximum theoretically required for one representative.

All other representatives similarly represent a number of registered voters within the permissible extremes, as shown by the following table:

Representative District	1958 Registered Voters	No. of House Members	Ratio of Members to Voters
1	2,209	1	1-2,209
2	13,836	3	1-4,609
3	2,986	1	1-2,986
4	3,862	1	1-3,862
5	2,641	1	1-2,641
6	2,560	1	1-2,560
7	14,195	4	1-3,548
8	13,876	4	1-3,469
9	5,929	2	1-2,964
10	12,926	4	1-3,231
11	10,525	3	1-3,508
12	8,372	3	1-2,791
13	7,621	2	1-3,810
14	14,134	4	1-3,533
15	21,063	6	1-3,510
16	13,746	4	1-3,436
17	13,455	4	1-3,364
18	11,381	3	1-3,797

It is true that different results are obtained for most representative districts when the base used is total, or gross, population. For example, if 1960 gross population is used, voters in a single senatorial district (5th) would elect a majority of senators *and* a majority of representatives. Yet voters *registered* in that district in 1958 represented less than 34% of the voters registered in the State and, in 1962, less than 38% of the voters registered in the State! (See Plaintiffs' Exhibit 1. Representative districts 8, 9, 10, 11, 12 and 13 make up the 5th senatorial district.)

The difference is accounted for by reason of the large military population residing on military bases in the 5th senatorial district.

A recent ruling of the Hawaii State Supreme Court determined that persons residing on military bases in

Hawaii were not eligible to vote because they could not gain the required residency in the State so long as they resided on military bases. In *Re Robinson,* decided October 30, 1964.

In addition, felons in prison are ineligible, as are minors and adults not meeting the residency requirements prescribed for voting.

Voter eligibility in Hawaii depends upon age and residence. The age must be twenty and the residency must be for one year in the State and three months in the district. (Article II, Sections 1 and 3 of the Constitution of the State of Hawaii; Section 11-6 and 11-8, Revised Laws of Hawaii 1955)

The appellant in No. 318 attempts to dismiss the question of standing in his argument that persons and not voters are those protected by the Equal Protection clause. (Brief at p. 45.)

But it is submitted, a transient in military service, an insane person, a child or an unpardoned felon would have no standing to complain about being discriminated against in an apportionment plan simply because he has no right to vote. Appellee repeats: it is the right to vote that is protected, nothing more.

In *Colegrove* v. *Green,* 328 U.S. 549, at 569, this Court stated:

> The constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast.

See also *Gomillion* v. *Lightfoot,* 364 U.S. 339 at 346.

In *Baker* v. *Carr,* 369 U.S. 186, Mr. Justice Brennan stated the question presented in these words:

> These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to *voting population.* The injury which appellants assert is that this classification disfavors the *voters* in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis *voters* in irrationally favored counties. A citizen's right to a *vote* free of arbitrary impairment by *state action* has been judicially recognized as a right secured by the Constitution (citing instances and cases.) (Emphasis added.)

The District Court in *Sincock* v. *Duffy,* 215 F. Supp. 169, at 184, referred to this Court's decision in *Baker* v. *Carr,* describing the holding in that case:

> Mr. Justice Brennan stated that one of the jurisdictional questions presented by Baker v. Carr was whether or not the plaintiffs had alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions . . . This is the gist of the question of standing. 369 U.S. at 204. The answer given by the Supreme Court was that the plaintiffs had standing to maintain the suit *if their franchise* had been subjected to invidious discrimination and if they had a personal stake in

the outcome of the controversy. *Baker* v. *Carr,* 204-208. (Emphasis supplied.)

In *Pope* v. *Williams,* 193 U.S. 621, a Maryland statute requiring that a person coming into the state to reside should make a declaration of intent a year before he should have the right to be registered as a voter of the state was held by this Court to violate no right protected by the Federal Constitution. Mr. Justice Peckham, speaking for the Court, stated (at 632):

> The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Mimor v. Hoppersett, 21 Wall. 162, 22 L. Ed. 627. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.

This appellee respectfully urges this Court to affirm the lower Court's ruling that in Hawaii a registered voter basis for apportionment is constitutionally permissive.

2. HAWAII'S MULTIMEMBER DISTRICTS VIOLATE NO RIGHT PROTECTED BY THE FEDERAL CONSTITUTION. The question of the validity of multimember districts in a legislative apportionment plan would seem to have been put at rest by *Lucas* v. *The 44th General Assembly of the State of Colorado,* 377 U.S. 713, and, if not by that, by *Fortson* v. *Dorsey,* 379 U.S. 433.

As was said in *WMCA* v. *Lomenzo,* 238 F. Supp. 916, affirmed October 11, 1965, 34 Law Week 31[illegible], No. 85,

> Unlike a fractional district, the extraordinary population of a multimember district is balanced in all respects by its extraordinary number of representatives. (238 F. Supp. at 924.)

Hawaii does not have the extremely long ballot, found by this Court in *Lucas* to be "undesirable". No "long" ballot is found in any district in Hawaii. The highest number of representatives to be elected from any district is in the 15th district on Oahu where six representatives are elected. Even under the current apportionment of the senate, the highest number to be voted for in any election year is three.

This Court's words in *Fortson* v. *Dorsey,* 379 U.S. 433 at 439, are applicable here:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us.
>
> The record thus does not contain any substantiation of the bald assertion in appellees' brief. Since, under these circumstances, this issue has "not been formulated to bring it into focus, and the evidence has not been offered or appraised to decide it, our holding has no bearing on that wholly separate question. *Wright* v. *Rockefeller,* 376 U.S. 52, 58.

There is nothing in the record in these consolidated appeals which demonstrates that the multi-member dis-

tricts in Hawaii "operate to minimize or cancel out the *voting* strength of racial or political elements of the *voting* population".

The appellant in No. 318 is persuaded, in his argument that the multi-member districts in Hawaii are bad, by his own argument that total population must be used. As we have demonstrated, this base, *in Hawaii* is not valid.

The appellant in No. 318 relies, in part, on *Drew* v. *Scranton,* 229 F. Supp. 310, remanded on other grounds, 379 U.S. 40, to show that the multi-member districts in Hawaii violate some constitutional guarantee, and quotes, from that case (Brief, pp. 75-76, footnote 7) as follows:

> In the absence of any legislative history or other explanation justifying it, and we have found none, we can only conclude that this districting is either the result of gerrymandering for partisan advantage, as was suggested at the hearing, or that it was wholly arbitrary and capricious. Id., at 326.

In the first place, that Court was clearly in error in suggesting that there was any constitutional guarantee against "gerrymandering for partisan advantage".

In affirming *WMCA* v. *Lomenzo,* on October 11, 1965, (34 Law Week 3115) Mr. Justice Harlan, concurring in this Court's summary affirmance, stated:

> In WMCA, Inc. v. Lorenzo, 238 F. Supp. 916, the three-judge court found that Plan A satisfied [the order to enact "a valid apportionment scheme"]; in so doing it rejected contentions that apportioning on a basis of citizen population violates the federal constitution, . . . and that partisan 'gerrymandering' may be subject to federal constitutional attack under the Fourteenth Amend-

> ment. In affirming this decision, this Court necessarily affirms these two eminently correct principles.

Judge Waterman, in that case, had said "of course, the ultimate fitness of the scheme for their needs and purposes is for the people of the State of New York, themselves, to decide, and not for this court to mandate". 238 F. Supp. at 927.

Judge Waterman also correctly observed that

> The integration of Democrats and Republicans, or Liberals and Conservatives, has no privileged status under the Federal Constitution. (at 926)

In *Davis* v. *Cameran,* 238 F. Supp. 462, a similar statement was made by District Judge McManus, concurring with the majority on this point:

> So long as a State's system of legislative apportionment meets the test of substantial equality of population among the several legislative districts, to have or not to have multi-member districts is a matter of civic taste to be determined in each State by the political majority in control. (at 468.)

In the second place, as we will show in the next argument, and, as the lower Court found, Hawaii's representative districts "followed along historical, political, geographic and physical lines", and that "[T]here was no gerrymandering in the invidious sense." (238 F. Supp. at 476.)

3. THE BOUNDARIES OF THE REPRESENTATIVE DISTRICTS WERE RATIONALLY DRAWN AND FOLLOWED HISTORICAL, POLITICAL, GEOGRAPHIC AND PHYSICAL LINES. THERE WAS NO ERROR IN THE LOWER COURT'S APPROVAL OF THEM. Hawaii is unique among the several states

in its geographic composition. The state consists of seven inhabited islands, each separated from the other by miles of the Pacific Ocean. These islands, singly or with others, constitute but four counties. The island of Hawaii is the County of Hawaii; the islands of Maui, Molokai and Lanai are grouped together to form the County of Maui; the islands of Kauai and Niihau make up the County of Kauai; and the island of Oahu (together with tiny and largely uninhabited islands not included in any other county) constitutes the City and County of Honolulu.

Each island is different.

As was stated in *Drew* v. *Scranton,* 229 F. Supp. 310, 319:

> But it remains true, we believe, that the bulk of the people of a [Pennsylvania] county have a definite community of interest which they do not share with the people of other counties, even adjoining ones.

In recognition of this diversity of interest which exists among the four counties, the Constitutional Convention delegates drafting Hawaii's constitution deferred to the delegates from each county the determination of the question of legislative districts within their own county.*

The delegates from the County of Kauai, the smallest county in terms of population, chose to have their representatives elected at large and decided against

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* While it is of course true that the convention could take final action only through a majority of its members, the proposals or recommendations made by the delegates from the several counties were accepted by the convention. The entire scheme of apportionment was then approved by the legislature and the voters.

legislative districts. Based upon the number of registered voters at that time, three representatives were apportioned to that county after the initial apportionment of one member to that county was made. Because of a greater increase in registered voters in other counties by 1958, Kauai became entitled to only two additional representatives under the 1959 reapportionment. Again, all three were elected at large.

Maui county delegates determined that the sparsely populated islands of Molokai and Lanai should constitute one district for the county and the island of Maui a second district, without separate legislative districts. The 1950 apportionment gave the district of Molokai and Lanai one representative and the district of Maui, five. All were elected at large in their respective districts.

The relative increase in the number of registered voters in other districts at the time of the 1959 reapportionment decreased the number of representatives to be elected from the county of Maui (both districts) to five (four in addition to the basic one initially allocated to each county).

Hawaii county is the largest in size of the island chain, although second in population. Compared to other islands distances between population centers is more significant. There is also a difference in the economy of different areas.

In recognition of these local districts, the delegates from Hawaii county chose to district the island into five districts, each bounding area having substantially the same community of interests.

In the 1950 apportionment, after the initial allocation of one representative to the county, it became en-

titled to seven additional members. These eight members were then apportioned among the five districts and, within each, the members were elected at large.

Four of the districts elected one representative each and one, embracing the bulk of urban Hilo, elected four.

The 1959 reapportionment resulted in a decrease in the county's total representation by one member and the lost member came from the Hilo district, which now elects only three members.

Delegates from Oahu, the fourth and most populated county, had a more difficult time in resolving the question of districts. With the 1950 apportionment allocating a total of 33 representatives to the county, it was obviously impractical to elect all 33 at large. Some division was required.

Although there were many alternative plans proposed, the final districts were chosen on an historical basis.

Long before Hawaii created county governments, it had divided the islands into districts for various administrative purposes.*

At the time of the Great Mahele, in 1848, the island of Oahu was divided into six districts, Ewa, Kona (later renamed Honolulu), Koolauloa, Koolaupoko, Waialua and Waianae. (See: Chinen, The Great Mahele, p. 3.)

In 1859 Ewa and Waianae were combined (Hawaiian Civil Code of 1859, s. 498) but, when the county act

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* Although Section 56 of the Hawaiian Organic Act provided that the legislature "may" create counties, no county governments were created until 1905.

was enacted in 1905, they were split into the separate districts that had existed at the time of the Great Mahele. (Session Laws of 1905, Act 39.)

It was natural for the delegates in 1950 to make reference to those major administrative districts that had existed for over 100 years in dividing Oahu into representative districts.

Initially, the delegates created three representative districts from the five rural districts of Koolauloa, Koolaupoko, Ewa, Waianae and Waialua.

Koolauloa and Koolaupoko (having a total registered voter population of 3,121) were combined to form the 8th representative district. These two districts join and are the only two on the "windward" side of the Koolau Range of mountains which splits the island of Oahu lengthwise.

The district of Waialua (having a registered voter population of 2,086) became the 9th representative district.

The districts of Ewa and Waianae (having a registered voter population of 2,953) were combined to form the 10th representative district.

Under the method of equal proportions, these districts each became entitled to two of the 33 representatives allocated to the island of Oahu.

The remaining 27 members were still too numerous to elect at large from the Honolulu district, the urban center of Oahu, and it became necessary to divide the Honolulu district into several smaller representative districts.

On what basis?

Again, the delegates turned to Hawaiian history for their answer.

> Their lives having been closely associated from ancient times with the soil, the Hawaiians took great interest in the lands on which they lived and from which they derived their livelihood. For purposes of easier control and management, the Hawaiians divided all the lands within the Islands into a number of divisions, gave each division a separate name, and defined its boundaries to the best of their ability. Certain persons were trained to retain the knowledge of these divisions, and such knowledge was carefully passed on from generation to generation.
>
> To a large extent, the Hawaiians made the divisions of the lands along rational lines, following a mountain ridge, the bottom of a ravine, or the center of a stream or river. But oftentimes only the line of growth of a certain type of tree or grass marked a boundary; and sometimes only a stone determined the corner of a division.
>
> The largest unit or division of land was, naturally, the island. Each island was then divided into a number of districts called "mokus". These districts or mokus were geographical subdivisions only, and no administrators were assigned to them. . . .
>
> A moku was divided for landholding purposes into units called "ahupuaas", each of which was ruled by either a chief or a konohiki. The ideal ahupuaa extended from the sea to the mountains, enabling the chief of the ahupuaa and his followers to obtain fish and seaweeds at the seashore, taro, bananas, and sweet potatoes from the lowlands, and forest products from the mountains. However, more often than not, an ahupuaa failed to to extend to either the mountain or the seashore, being cut off from one or the other by the odd shapes of

other ahupuaas. Although the ahupuaa has been called the "unit" of land in the Islands, it is not a measure of area as the acre is. While the acre contains a definte area, the ahupuaas vary in size. Though the smaller ahupuaas contain only a hundred acres of land, the larger ones contain more than 100,000 acres. (Chinen, The Great Mahele, pp. 1-3.)

Adhering, as nearly as possible, to the ancient Hawaiian "ahupuaa", the delgates created seven representative districts out of the District of Honolulu. Where there was any departure from the concept of divisions from the mountains, along the ridges and to the sea, it was to embrace within each representative district substantially the same number of registered voters. These representative districts, although not precisely defined in accordance with sections of Honolulu that were known by particular names, nevertheless followed substantially their boundaries.

Thus, areas known by name became representative districts, their names and the representative district numbers being as follows:

Popular Name	Representative District
Kalihi	11th district
Kapalama	12th district
Nuuanu	13th district
Pauoa	14th district
Manoa	15th district
Kaimuki	16th district
Wilhelmina Rise	17th district

Based upon the number of registered voters in each of these districts, the remaining 27 numbers were allocated within the district of Honolulu.

The result for the entire island, in terms of the number of registered voters for each representative of the district was as follows:

District	No. of Voters per Representative
8	3,121
9	2,086
10	2,953
11	2,497
12	2,164
13	2,271
14	2,574
15	2,599
16	2,374
17	2,095

For the entire island of Oahu, the number of voters per representative was 2,467. This number compared with the three other counties was: Hawaii, 1 to 2,559; Maui, 1 to 2,361; and Kauai, 1 to 2,305.

The Hawaii scheme is supported by legislative history and reason and is not arbitrary and capricious.

The scheme for apportioning members of the house of representatives in Hawaii among the several districts is kept current by the provisions of Article III, Section 4 of the State Constitution.

Regardless of changes in registered voter population in between reapportionment dates, an apportionment valid when accomplished remains valid for at least 10 years:

> Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some

> imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect. (*Reynolds* v. *Sims,* 377 U.S. at 583, 584.)

This appellee submits that the representative districts for the house of representatives are valid.

4. THERE WAS NO ERROR IN THE LOWER COURT'S DENYING THE EXISTENCE OF ANY LEGISLATIVE POWER TO ENACT A TEMPORARY APPORTIONMENT PLAN. UNDER THE CONSTITUTION OF THE STATE OF HAWAII REAPPORTIONMENT MAY BE ACCOMPLISHED ONLY BY CONSTITUTIONAL AMENDMENT. OF COURSE, THE DISTRICT COURT'S POWER TO PROVIDE AN INTERIM PLAN BY ITS OWN ORDER IS UNDOUBTED. The Hawaii State Constitution provides a scheme for apportioning the members of each house of the legislature. No provision is made for reapportioning the Senate except by constitutional amendment or revision, but the House of Representatives is required to be reapportioned at ten-year intervals by the Governor. The basis for such reapportion-

ment—the number of voters registered in each of the four counties and in each of 18 representative districts—is set forth in the constitution. The precise boundaries of each representative district are also set forth in and are an integral part of the constitution.

If these provisions are invalid, how can they be changed?

This appellee submits that changes in the constitution can only be made in the manner prescribed by the document itself—not by the legislature.

Section 55 of the Hawaiian Organic Act provided that:

> The legislature, at its first regular session after the census enumeration shall be ascertained, and from time to time thereafter, shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of the population in each of said districts who are citizens of the Territory.

The Hawaiian Organic Act was approved and took effect April 30, 1900.

No such reapportionment was ever accomplished by the legislature and this fact was known to the delegates of the constitutional convention. In designing a method of reapportioning members of the legislature, the delegates deliberately removed the legislature from *any* role whatever in such function.

The duty of reapportioning the House of Representatives was granted to the Governor, who could be compelled by mandamus to do his duty. (Haw. Const., Art. III, Sec. 4)

No provision was made for periodic reapportionment of the Senate. Any such reapportionment was to be made only by amendment and then only with the approval of the majority of the voters in each of the majority of the counties. (Haw. Const., Art. XV, Sec. 2)

References to correction of legislative malapportionment by legislatures of other states are inappropriate and meaningless.

In Alabama (*Reynolds* v. *Sims*) the constitution granted power to the legislature to reapportion both houses of the legislature. (see Ala. Const., Art. IV, Sec. 50 and Art. IX, Secs. 198-203.)

In New York (*WMCA* v. *Lomenzo*) reapportionment was a function of the legislature. (see New York Const., Art. III, Secs. 3-5.)

In Colorado (*Lucas* v. *General Assembly*) the legislature was the apportioning authority. (see Colo. Const., Art. V, Secs. 45-49.)

In Virginia (*Davis* v. *Mann*) the general assembly was the apportioning authority. (see Virg. Const., Art. IV, Sec. 43.)

In Delaware (*Roman* v. *Sincock*) districts were specifically established by the constitution and no provision was made in the constitution for reapportioning either house. However, amendments to the constitution are permitted to be made by passage of an amendment by two consecutive legislatures, without a requirement of a popular referendum. (see Del. Const., Art. XVI, Secs. 1, 2.)

In Maryland (*The Maryland Committee etc.* v. *Tawes*) the constitution provides that the Governor

shall reapportion the House and no provision is made for reapportionment of the Senate. (Md. Const., Art. III, Secs. 2, 5.)

In each of the above cases, the legislatures of the states had constitutionally granted power to reapportion. In only one, Maryland, was there no constitutional grant of power to the legislature to do so.

In *Maryland Committee etc.* v. *Tawes,* 228 Md. 412, 180 A. 2d 656, the court decided the apportionment of the Maryland General Assembly was invalid. In considering the relief to be given, the court noted that relief asked was to restrain the election officials from conducting the November 1962 election under the existing apportionment plan. Noting that there was no provision for at-large elections, the majority concluded that if it should declare the existing apportionment invalid for the 1962 election:

> it should also declare that the Legislature has the power, if called into Special Session by the Governor and such action be deemed appropriate by it, to enact a bill reapportioning its members for purposes of the November, 1962 election. (180 A. 2d, at 670)

As justification for such action, the majority asserted:

> With Sections 2 and/or 5 no longer a part of the Constitution with reference to said election, this necessarily follows, because the powers of the General Assembly of Maryland are plenary, except as limited by constitutional provisions. *McMullen* v. *Shephard,* 133 Md. 157, 104 A. 424; *Brawner* v. *Supervisors,* 141 Md. 586, 119 A. 250; *Hennegan* v. *Geartner,* 186 Md. 551, 47 A. 2d 393. 180 A. 2d, at 670)

This assertion was challenged by two dissenting justices:

> The statement in the majority opinion in the instant case, if the provisions of the Maryland Constitution, Article III, Sections 2 and 5, were stricken down, in whole or in part, the Legislature would possess the power to remedy the situation, I think is gratuitous and unsupportable. The point is not properly before us under Maryland Rule 885, since it was not raised below, and was never mentioned in the arguments in this court . . .
>
> . . . In any event, the matter of how the Legislature shall be elected has always been regulated in Maryland by the Constitution itself. To my mind, no doctrine of plenary or inherent powers can take away a right to deal with a subject matter expressly reserved to the people of this state, and vest it in a legislative body. cf. *Bennett* v. *Jackson,* 186 Ind. 533, 116 N.E. 921. (180 A. 2d at 674)

In *Bennett* v. *Jackson,* the legislature had enacted a bill calling for a constitutional convention. No power was granted in the state constitution to the legislature to do so and the validity of its action was challenged.

The court, relying in part on *Ellingham* v. *Dye,* 178 Ind. 336, 99 N.E. 1, declared the act void, stating:

> If the passage of such a bill is within the purview of the Constitution governing ordinary legislation, there would be no question but that the General Assembly might, without any suggestions, proceed to the enactment of such legislation, for the reason that within the field of legislation as fixed by section 1, article 4, of the present Constitution, the Legislature is supreme and its actions are circumscribed only by the terms of the state or federal constitutions . . .

> The Legislature has no inherent rights. Its powers are derived from the Constitution, and hence, where some action of the legislative body, which action is outside of the particular field fixed by the Constitution and is not strictly legislative within the meaning of section 1, article 4, supra, is sought to be justified, a warrant for the same must be found somewhere; if not in the Constitution, then directly from the people, who, by the terms of section 1, article 1, of the Bill of Rights, have retained the right to amend or change their form of government. The right of the people in this regard is supreme, subject, however, to the condition that no new form of a Constitution can be established on the ruins of the old without some action on the part of the representatives of the old indicating their acquiescence therein. (116 N.E., at 922-923)

In *Ellingham* v. *Dye,* 178 Ind. 336, 99 N.E. 1, Writ of Error dismissed, 231 U.S. 250, the challenge was to a legislative enactment purporting to amend the existing state constitution, subject to voter approval after submission to the voters. The underlying question was whether or not the act was a valid exercise of legislative power.

The argument was made that the legislature had the power to initiate, draft and submit a new constitution to the people in such form and manner as would enable them to adopt it as the organic law of the State.

The court rejected this proposition, stating that:

> The words "legislative power", in a constitutional delegation of general legislative authority, "mean the power or authority, under the Constitution or frame of government, to make, alter and repeal laws". . . . To erect the State, to institute the

> form of its government, is a function inherent in the sovereign people; . . . (99 N.E., at 4)

The court also asserted:

> It is settled that amendments to our [State] constitutions are to be made only in modes pointed out or sanctioned by the instrument itself, the legal exponent of the will of the majority, which alone is entitled to the force of law.

Other cases, unlike *Maryland Committee etc.* v. *Tawes, supra,* where the point has been raised and argued, have likewise held that a constitution can only be amended in the constitutionally prescribed manner.

Even necessitous circumstances do not give any license to disregard constitutional provisions.

> Necessity that is higher than the Constitution can safely have no place in American jurisprudence. That principle is necessarily vicious in its tendency, and subversive to the Constitution. It should be, and is, limited by the constitutional inhibitions. . . . The Constitution, and a controlling necessity antagonistic to its requirements, cannot exist. 9 Tex. Jur. P. 421, § 10; quoted with approval in *Traveler's Ins. Co.* v. *Marshall,* 76 S.W. 2d 1007 (Texas)

See: *Johnson* v. *Croft,* (Ala.) 87 So. 375, 376; *Crawford* v. *Gilchrist,* (Fla.) 59 So. 963.

And in *State* v. *Arregui,* 254 Pac. 788, 52 ALR 463, 471, it is stated that:

> Law and court-made rules of expediency must not be placed above the Constitution.
>
> . . . . .
>
> If, one by one, the rights guaranteed by the federal Constitution, can and must, for expediency's

sake, be violated, abolished, stricken from that immortal document, and from state constitutions, we will find ourselves governed by expediency, not laws or constitutions, and the revolution will have come.

Neither can ~~this court~~ a State Supreme Court amend the constitution, by requiring elections at large or by reapportioning the legislature according to its own formulae.

In *Miller* v. *Johnson,* 92 Ky. 589, 18 S.W. 522, the court acknowledged that the judiciary cannot compel a co-equal department to perform a duty.

> It is responsible to the people; but if it does act, then, when the question is properly presented, it is the duty of the Court to say whether it has conformed to the organic law. While the judiciary should protect the rights of the people with great care and jealousy, because this is its duty, and also because, in times of great popular excitement, it is usually their last resort yet it should at the same time be careful not to overstep the proper bounds of its power as being perhaps equally dangerous; and especially where such momentous results might follow as would be likely in this instance, if the power of the judiciary permitted, and its duty required, the overthrow of the work of the convention.

In *State* v. *Thorson,* 9 S.D. 149, 68 N.W. 202, it was stated that:

> The powers of the state government are divided into three distinct departments—the legislative, executive, and judicial. The powers and duties of each are prescribed by the constitution. Const. art. 2. Power to amend the constitution belongs exclusively to the legislature and electors. It is legislation of the most important character. This

> court has power to determine what such legislation is, what the constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the constitution; but it cannot say what laws shall or shall not be enacted.

In *Radford* v. *Gary,* 352 U.S. 991, the Supreme Court affirmed the District Court's refusal to mandamus the Governor to call a session of the legislature, to mandamus the legislature then to apportion, and if they did not comply, to mandamus the State Supreme Court to do so.

People ex rel Sammons v. *Snow,* 340 Ill. 464, 173 N.E. 8, involved excessive bail required of an alleged vagrant in violation of the Illinois Constitution. The court stated that:

> The judge has no more right to disregard and violate the Constitution than the criminal has to violate the law. It is the duty of the courts to support and maintain the Constitution, and if the judges, who have taken an oath to support the Constitution, openly violate it, how can they expect the courts to retain the confidence and respect of the people. (72 ALR, at 801)

In *Sweeney Jr. et al.* v. *Notte,* 183 A. 2d 296 (R. I.), an action involving alleged legislative malapportionment, it was stated that:

> In the absence of constitutional warrant to the contrary this court has no authority to require the general assembly to meet in special session, nor to require the governor to exercise his constitutional prerogative to call such a session. Furthermore, we are not persuaded that our obligation to resolve the justiciable issues herein considered is so

broad as to require us to hold that the superior court would be warranted in supervising reapportionment of the house of representatives, in the unlikely event that the general assembly should fail to do so. Such a declaration would be in the nature of mandamus by duress. In light of the exclusive prerogative of the general assembly to apportion the membership of the house, we will respect the co-ordinate relationship existing between us.

We do deem it obligatory upon us, however, to observe that if the general assembly fails, within such reasonable time as circumstances may permit, to reapportion the house of representatives consistent with the equal protection guaranteed by the United States constitution, a federal court will probably do so.

In a concurring opinion, the proposition was put in this manner:

I am convinced, however, that because the power to apportion in this state is textually committed by the constitution to the legislature, the power of this court in the manner extends only to a determination of the constitutionality of apportionment legislation. The courts of this state, in my opinion, are without power, inherent or conferred, to apportion the house of representatives either directly or indirectly by resort to the equity jurisdiction. I have not been persuaded that the courts of this state possess any power to enjoin the elective process established by the legislature absent some showing of action by an officer or board in excess of the authority conferred by such legislation or of the invalidity of that legislation on constitutional grounds. In the instant action the laws of the state establishing the elective process have not been challenged.

> When it is found that an apportionment statute is repugnant to the equal protection clause of the federal constitution, the duty to provide for an apportionment that will not be in conflict with the provisions of the fourteenth amendment as the supreme law of the land is cast upon the legislature. See *Cooper* v. *Aaron,* 358 U.S. 1. This court is not warranted in concluding that this coordinate branch of the state government, having been made aware of the unconstitutionality of the existing apportionment legislation, will not move promptly and effectively to provide for an apportionment that will be consistent with the supreme law of the land.

In Rhode Island, the apportioning authority was granted by the constitution to the legislature. As previously stated, changes in district boundaries and in the bases for apportionment of each house, were reserved to the people.

The Hawaii State Constitution provides, in Article I, Section 1:

> All political power of this State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

Article III, Section 1, provides:

> The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation, not inconsistent with this constitution or the Constitution of the United States.

It is submitted that with powers of constitutional amendment having been reserved to the people, with

the people having all political power inherent in themselves, and with the legislative power of the legislature extending only to subjects of *legislation* not inconsistent with the State Constitution, that it is eminently clear that the lower Court had no authority to direct the legislature to amend the constitution, or to amend the constitution by any judicial decree or order.

This Court, in *The Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 595, accepted the Maryland Court of Appeals' interpretation of the existence of legislative power to reapportion because that Court had found it to exist:

> With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland legislature *presumably* has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements. (377 U.S. at 675-676.)

That this Court was *accepting* the Maryland Court of Appeals' interpretation was made eminently clear by the Court's footnote, following the above quotation:

> 23. See 228 Md., at 438-440, 180 A. 2d, at 670-671, where the Maryland Court of Appeals stated that, if the Maryland constitutional provisions relating to legislative apportionment were found invalid by the lower court, the Maryland Legislature would have the power to enact reapportionment legislation, "because the powers of the General Assembly of Maryland are plenary, except as limited by constitutional provisions". See also the reference to this matter earlier in this opinion, ante at [377 U.S. 670.] (377 U.S. at 675-676.)

In *Guntert* v. *Richardson,* 47 Haw. 662, 394 P. 2d 444, the Hawaii Supreme Court held the Hawaii State Constitution required any change in the apportionment of the senate to be by constitutional amendment. Such holding was not dictum, as claimed by the appellant in No. 318. (Brief, page 89.) The question was clearly before the Court:

> At least in the initial stages of the problem presented by the invalidity of this provision [Article III], the question whether such invalidity can be cured by act of the legislature itself, or requires an amendment of the State Constitution, is one of local law, not federal constitutional right. We note that the Supreme Court has said that "the delay inherent in following the state constitutional prescription for approval of constitutional amendments * * * cannot be allowed to result in an unpermissible deprivation of [the] right to an adequate voice in the election of legislators * * *." Roman v. Sincock, supra. But that was said in a case where, at the time of rendition of the Supreme Court opinion, the case had been pending for two years during which a constitutional amendment had been achieved but had proved invalid. We see no indication that the matter of the machinery to be used to cure the invalidity of the Senate plan presents a federal question at the inception of Hawaii's efforts in that direction.
>
> Viewing this as a local question we note that Article XV, section 2, paragraph 6 of the State Constitution provides that any constitutional amendment shall be approved by a majority of the votes tallied upon the question, constituting at least 35% of the voters, and specifically provides that "no constitutional amendment altering * * * the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied

upon the question in each of a majority of the counties." The agreed statement sets out that the parties are in agreement that this provision "contains a built-in impediment which has the necessary effect of perpetuating inequality in senatorial representation, and therefore is violative of the equal protection clause of the 14th Amendment * * *." Since the parties are in agreement, no justiciable controversy is presented as to this matter, and perhaps that would be true at this stage in any event. The point now of importance is that the quoted provision plainly contemplates that any change in the representation from any senatorial district will be by constitutional amendment. Even if the added provision as to a majority vote in a majority of the counties should prove to be unconstitutional, that would not render invalid the requirement that the change be by constitutional amendment.

If any step is to be taken toward a constitutional amendment or amendments it should be done before the 1964 elections, in order to avoid delay in obtaining a vote of the people as provided by Article XV. However, the legislature is now in special session. We must and do assume that the legislature will take suitable action. That possibility provides justification "for a court of equity to stay its hand temporarily."

What ~~That~~ the Hawaii Supreme Court did not decide was whether *it* had the power to set aside this constitutional requirement:

In the second place, in order to interfere with the 1964 elections on the theory that a temporary reapportionment plan should be put into effect for those elections, we would have to be convinced that plaintiffs' rights under the federal constitution require this mutation of the State Constitution without even awaiting a reasonable oppor-

> tunity for the State Constitution to operate as intended. We lay aside that question because there are other considerations which make it unnecessary to decide it, at least at this time. (at page 670.)

This appellee respectfully submits that the lower Court was correct in holding that the legislature had no apportioning powers and that, except for an interim plan made effective by order of the court, any reapportionment of the Hawaii legislature must be by constitutional amendment. The question is one of local law, it has been decided by the Hawaii Supreme Court, and this Court is bound to accept that determination, just as it did in *The Maryland Committee for Fair Representation* v. *Tawes,* 377 U.S. 656.

5. THE LOWER COURT WAS CORRECT IN REQUIRING THE LEGISLATURE TO PROVIDE THE MACHINERY FOR A CONSTITUTIONAL CONVENTION TO CORRECT THE MALAPPORTIONMENT OF THE SENATE. THIS WAS THE ONLY MEANS BY WHICH THE PEOPLE OF HAWAII COULD ACT WITHIN THE 1966 GENERAL ELECTION DEADLINE APPARENTLY SET BY THIS COURT. The lower Court determined that the Hawaii Senate, at least, must be reapportioned before the 1966 general election. In doing so, it obviously adhered to the apparent deadline set by this Court in the June, 1964, Reapportionment cases.

In ordering a constitutional convention, the lower Court also followed the blessing given by this Court to the lower Court in *Reynolds* v. *Sims, supra,* at 541:

> We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the im-

pending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

Because in *Alabama* apportionment is a legislative function and in *Hawaii* it is not, being a matter expressly reserved to the people through constitutional amendment, the lower Court in the instant case properly read the above-quoted language as an approval of this Court to deferring court action until the people of Hawaii "had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme".

And the only way the people of Hawaii could do so within the time provided was by constitutional convention.

There are only two ways set forth in Hawaii's constitution for amending that document. (Haw. Const., Art. XV, Sec. 1.)

One is by the legislature proposing an amendment to the people for their approval. Such legislative proposal may be submitted to a vote *only* at a general election. (Haw. Const., Art. XV, Sec. 3.)

It is obvious that this method could not be used as the amendment could not be effective prior to the general election in 1966. It was, therefore, not used by the court in its order.

The other method is by a constitutional convention being convened for the purpose of proposing amendments to the people for their approval. (Haw. Const., Art. XV, Sec. 2.)

This method was workable because the elections required by Article XV, Section 2, may be *special* elections—each of which could be held *prior* to the *general* election in 1966.

After the lower Court had entered its February 17, 1965, order calling for a convention (for the obvious reasons noted above) the legislative parties asked the Court to amend that order to permit the legislature to propose to the Court a reapportionment plan that the Court could make effective by its own order in time for the election of senators in 1966. Because of considerations of time and expense, the Court modified its order of February 17 to permit the legislature to: (1) propose a temporary plan for the Court to approve and order into effect, (2) propose a constitutional amendment for a permanent plan that could be voted on at the 1966 general election and (3) to cause the question of calling a convention to be placed on the ballot at the general election in 1966.

When the legislature failed to produce a temporary plan satisfactory to the District Court for the conduct of the 1966 election of senators, the lower Court reinstated all of the provisions of its order of February 17, 1965.

The District Court had fully advised the legislative parties that this is what it would do if no acceptable proposal was forthcoming under the modification of its February 17, 1965, order:

> If the measures set forth in paragraphs (a), (b) and (c) above shall not have been enacted and adopted by the legislature on or before the twentieth calendar day following the date of the order granting the motion to amend the said Decision and Order, and made operative, and if the same after hearing *shall not have been approved by the court,* then, as far as then and thereafter applicable, item 4 on pages 19 and 20 and item 6 on pages 20 and 21 of the Decision and Order dated February 17, 1965 shall become automatically reinstated and thereafter remain in full force and effect as if the Motion to Amend the same had not been granted.
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> * * * * * * * * *
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> 6. This court retains jurisdiction of this action for all purposes, including but not limited to:
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> "(a) considering such sanctions as may be appropriate if the orders of this court are not carried out; and
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> "(b) judicially reapportioning and redistricting the Senate, in the event that the obligations of the parties above indicated are not fulfilled, or any reapportionment plan so enacted *is not approved by the court,* or the electors of Hawaii at the 1966 general election reject the proposed and court-approved constitutional amendment reapportioning the Senate, or under any other circumstances which this court shall deem appropriate.

At the time of the reinstatement of the Court's February 17, 1965, order on April 28, 1965, the time limits

set forth in the order were still within the reach of the legislature and the people in so far as the constitutional convention was concerned. And, the legislature was still in session with sufficient time to comply with the order. Appeals were, instead filed, and there was no further effort by the legislature to comply.

This appellee contends that there was no error committed by requiring the legislature to follow the Constitution of the State of Hawaii.

6. THE LOWER COURT HAD POWER TO RESTRAIN THE LEGISLATURE FROM TAKING ACTION ON OTHER MATTERS UNTIL THE LEGISLATURE COMPLIED WITH THE COURT'S ORDER, AND IT DID NOT ABUSE ITS DISCRETION IN DOING SO. Mr. Justice Frankfurter, dissenting in *Baker* v. *Carr,* 369 U.S. 186, at 268, observed that the Court's opinion conveyed "no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary".

It would appear reasonably obvious that if the game is to be played under rules laid down by the legislature, the judiciary may never win.

If played under the Court's rules the judiciary has, at least, an even chance.

So long as the order restraining the legislature from taking action on matters other than in compliance with the Court's orders was in force, the legislature worked on reapportionment matters. Once the restraint was lifted, nothing further in compliance with the Court's order was done.

This appellee submits that such a restraint as was imposed upon the Hawaii legislature was within the

power of the District Court and that its exercise was not an abuse of discretion.

7. THERE WAS NO ERROR IN THE LOWER COURT REFUSING TO APPROVE THE LEGISLATURE'S APPORTIONMENT SCHEME. At the time the District Court modified its February 17, 1965, order to permit the legislature to propose a reapportionment plan, it was clear to all that such a proposal had to be approved by the Court and that it would have effect only as an order of the Court.

As stated in the Appellant's Brief in No. 318 (at pages 16 and 17), following the modification of the Court's order, the legislature first proposed a plan of reapportionment for the Senate which would have divided Oahu into only two districts, from which nine and ten of the total of 25 senators would be elected. The Court informally gave notice that such a plan would not be acceptable to it, and gave written notice (see Appellant's Brief in No. 318, App. B., pp. 28a-29a) of the kind of an apportionment plan the Court had in mind if it were to fashion its own plan.

The legislature disregarded the advice, fashioning instead, a plan so different that the Court refused to accept it.

This appellee agrees with the statement of the Appellant in No. 318 that:

> As we have noted, the order of the District Court under which the Legislature's provisional plan for the Senate was submitted required that that plan be "approved" by the District Court, and the Legislature's Senate provisional plan provided that it should not go into effect without that approval. The Legislature's provisional plan for the

Senate, of course, was one which had had to win the approval of the very Senate which the District Court had held to be improperly constituted.

The District Court's disapproval, on the grounds stated in its opinion, is sustainable even if those grounds do not constitute a violation of the Fourteenth Amendment. The District Court has a broad power to fashion a remedy for previous unconstitutional state action. In *Fortson* v. *Toombs*, 379 U.S. 621 (1965), this Court stressed the "wide range" of discretion possessed by a district court in fashioning decrees to remedy malapportionment. The District Court could have fashioned and executed a reapportionment of the Senate itself, although it acted wisely in deferring doing so until plans had been submitted to it by the Legislature; if it had not deferred, the court would have had to make determinations not dictated by the Constitution. (Brief, at 104, 105)

CONCLUSION

For the reasons stated, the decision and Order of the District Court, dated February 17, 1965, as well as the Decision and Order, dated April 28, 1965, should be affirmed, at least in so far as they pertain to constitutional questions.

In terms of remedies, the passage of time has made the time table for legislative and convention action, set forth in the February 17, 1965, order, inappropriate and the District Court will, of necessity, have to change those times. Because any realistic time table would without doubt extend beyond the 1966 general election, a temporary plan will have to be ordered into effect by the District Court for application to the election of senators at that election.

In this regard, it is submitted that any temporary plan fashioned by the District Court should avoid precluding the people of Hawaii from having a free choice in the development of a permanent apportionment plan.

Respectfully submitted,

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